IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 13510 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJIV JAYANTIBHAI JHAVERI - Applicant(s)
Versus
LALURAM KELAJI AHIR & 2 - Respondent(s)

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Appearance :

MR RR MARSHALL for Applicant(s) : 1,
UNSERVED-REFUSED (N) for Respondent(s) : 1,
MR UDAYAN P VYAS for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2,
Mr. RC Kodekar, Addl. PUBLIC PROSECUTOR for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 02/07/2007

ORAL JUDGMENT

By way of this application under Section 482 of the Code of Criminal Procedure, the

petitioner, original-accused, has prayed for an appropriate order quashing the private complaint being Criminal Complaint No. 15681 of 2006 pending before the Court of learned Judicial Magistrate [FC], Surat.

2. The Criminal Complaint No. 15681 of 2006 is filed by the respondent No.1 herein, original-complainant in the Court of Chief Judicial Magistrate [FC], Surat against the petitioner, original-accused for the offence punishable under Section 138 of The Negotiable Instruments Act, 1938 [hereinafter referred to as 'the Act] alleging inter alia that a sum of Rs. 4,70,000 was given on loan to the petitioner, original-accused and the said amount was not returned by the petitioner. However the complainant issued one cheque bearing No. 322198 for Rs. 25000 dated 16.2.2006 in the name of Jai Bhavani Saree Centre and the said cheque was deposited by the complainant in the Bank on 22.2.2006 however the said cheque came to be returned by the Bank with

an endorsement “payment stopped by drawer”. It was alleged in the complaint that the complainant was informed about the return of the said cheque on 27.2.2006 and thereafter he had served Registered AD notice upon the petitioner, original-accused on 7.3.2006 which was replied to by the accused however the amount under the said cheque was not paid by the petitioner and therefore the aforesaid criminal complaint came to be filed against the petitioner for the offences under Sections 138 , 139 and 142 of the Act. That the learned JMFC by his order dated 13th April 2006 issued summons upon the petitioner for the offences punishable under Section 138 of the Act and therefore the petitioner has preferred the present application to quash the aforesaid complaint.

3. Shri RR Marshall, learned advocate appearing on behalf of the petitioner, original-accused, has submitted that in fact the petitioner has not committed any offence as

alleged under Section 138 of the Act as the said cheques were stolen for which a complaint was filed as well as an advertisement by way of public notice in the local newspaper, 'Gujarat Samachar' was given on 23.2.2006; simultaneously the petitioner also informed the Bank with regard to stoppage of payment; and therefore the learned trial Court ought not to have issued summons against the petitioner for offences under Section 138 of The Negotiable Instruments Act. It is submitted that instructions were given to the Bank for “stop payment” and even advertisement was also given in newspaper with regard to the said cheques being stolen and therefore it is requested to allow the present application as continuance of criminal prosecution against the petitioner for the offences under Section 138 of The Negotiable Instruments Act would be abuse of process of law.

4. The petition is opposed by Shri Uday Vyas, learned advocate appearing on behalf of

original-complainant. It is submitted that it is not disputed by the petitioner, original-accused that the cheque in question is not signed by him. It is submitted that the story with regard to the cheques in question being stolen is a question to be decided at the trial which is not required to be considered at this stage. It is submitted that all the ingredients for attracting the provisions of Section 138 of the Act have been fulfilled. Shri Vyas, learned advocate appearing on behalf of the original-complainant has relied upon the decision of this Court in the case of ***Joitaram K. Patel Vs. State of Gujarat and Another,*** reported in ***1999 [Vol.97] Company Cases Page 826*** whereby the learned Single Judge has held that the question whether a complaint can be quashed on the ground that the cheques were stolen and instructions to make stop payment were given is a question of fact which requires consideration in trial and therefore the complaint is not to be quashed. Under the

circumstances, it is requested to dismiss the

present application.

5. Heard the learned advocates appearing on behalf of the respective parties. At the outset, it is required to be noted that it is not disputed by the petitioner that the cheque in question is not signed by him. However the only contention raised on behalf of the petitioner is that the said cheques were stolen for which the Bank was informed; even a public notice was given in the local newspaper, “Gujarat Samachar”; and therefore he has not committed any offence under the Act. It is required to be noted that at this stage that the cheque in question is dated 16.2.2006 which was deposited by the original-complainant on 22.2.2006. It is also required to be noted that the alleged intimation by the petitioner to the Bank with regard to the cheques stolen is dated 22.2.2006, i.e., after the issuance of the cheque dated 16.2.2006 and even Public Notice is also dated 23rd February 2006, i.e., much after the issuance of the cheque dated

16.2.2006. As stated above, admittedly the cheque is signed by the petitioner. The date of the cheque is 16th February 2006 which when deposited in the Bank on 22.2.2006 was returned by the Bank on 27.2.2006; the notice was issued by the petitioner on 7.3.2006 and thereafter the complaint in question was filed on 29.3.2006, i.e., within the time limit as stipulated under the provisions of Sections 138 and 139 of the Act. In terms of Section 138 of the Act, what is required to be alleged in the complaint and what is required to be demonstrated is that the cheque was issued; the same was presented but it was dishonoured; notice in terms of the said provision was served on a person sought to be made liable; and despite service of notice neither any payment was made nor other obligations, if any, were complied with within 15 days from the date of receipt of the notice. Thus, all the ingredients for the offences under Section 138 of The Negotiable Instruments Act are satisfied so far as the present case is concerned.

6. As held by this Court in the case of *Joitaram K. Patel [supra],* if cheque is stolen or missing from the cheque book of the petitioner it raises a serious disputed question of fact which is not required to be gone into in the application filed under Section 482 of the Cr.P.C. It is also held by this Court that the object of Section 138 of the Act is to inculcate faith in the efficacy of banking operations and credibility in the transacting business of negotiable instruments. Thus, it is held that if the cheque was stolen or missing from the cheque book of the petitioner it raises a serious question of fact which cannot be gone into in the application which is filed under Section 482 of the Code and the said disputed question of fact cannot be decided merely on an affidavit. The petitioner can very well raise the said plea before the concerned Magistrate who had issued process against the petitioner for the abovestated offence. As stated hereinabove, the cheque is dated 16.2.2006; the same was

deposited on 22.2.2006; and the Public Notice in the local newspaper with regarding to the cheque being stolen was dated 23.2.2006, i.e., after the period of almost a week after issuance of the cheque. Thus, on the aforesaid ground the complaint is not required to be quashed in exercise of powers under Section 482 of the Code of Criminal Procedure as the same is highly a disputed question of fact which is not required to be gone into at this stage in a petition under Section 482 of the Code.

7. For the reasons stated above, it cannot be said that the learned trial Court has committed any error in issuing summons against the petitioner for the offence punishable under Section 138 of The Negotiable Instruments Act and that the complaint in question is not to be quashed and set aside. Hence, the present petition is required to be dismissed and is accordingly dismissed. Rule is discharged.

Rmr. [M.R. Shah, J.]